A

Public Prosecutor v Jamil bin Mahmod & Anor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 41–145 OF 1997
JEFFREY TAN J
17 OCTOBER 1998

B

Criminal Law *— Corrupt acceptance of gratification — Whether solicitation is an ingredient — Whether trial court misdirected itself in requiring proof of solicitation — Whether accused had knowingly, inadvertently or unwillingly accepted gratification for not issuing summons against complainant — Prevention of Corruption Act 1961 s 4(a)*

C

The respondent was an officer attached to the Majlis Perbandaran Pulau Pinang. On 11 April 1996, the respondent and one other person went to the complainant's ('SP5') house. The respondent informed SP5 that SP5 had erected the house awning without municipal approval and had therefore committed an offence. Then the other person said to SP5 that they would not take any action if SP5 would give RM300 to them. They said they would come back on 12 April 1996 but did not turn up. SP5 reported the matter to the authorities on 11 April 1996. On 15 April 1996, the respondent went to SP5's house but SP5 was not at home and the respondent asked for the telephone number of the house from SP5's daughter-in-law. Telephone calls were received on 20, 22 and 23 April 1996. The caller said that he would call at the house on 25 April 1996. The identity of the caller was not directly established but all the calls were traced to a mobile phone belonging to the respondent.

D

E

On 25 April 1996, the respondent arrived at the house. The respondent asked SP5 to put the money in a diary and took the diary with the money to the car. Anti Corruption Agency officers stationed outside the house surrounded the car and apprehended the respondent. The respondent was charged under ss 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961. At the close of the prosecution case, the trial court held that there was no evidence that the respondent heard what was said by that other person to SP5 on 11 April 1996, that the evidence seemed to show that that other person had acted on his own and that the prosecution had not proved that the respondent solicited a bribe from SP5 on 11 April 1996. The trial court found that there was no verbal solicitation after 11 April 1996 and held that the ingredient of the alleged s 4(a) offence had not been proved. The respondent was acquitted. The Public Prosecutor appealed.

F

G

H

Held, allowing the appeal; the order of acquittal set aside and the respondent ordered to enter his defence:

I

It was well within the jurisdiction of the trial court to scrutinize the evidence relating to the alleged solicitation, since solicitation was a factual ingredient of the alleged s 3(a)(ii) offence, and make findings of fact. However, in connection with the alleged s 4(a) offence and

ingredients of that offence, the trial court had fallen into serious error. Solicitation was not an ingredient of the alleged s 4(a) offence. Acceptance was. Yet the trial court was totally smitten by the utterances or not of the respondent after 11 April 1996 on the subject of the said RM300 or collection of RM300 from SP5 rather than the question of the acceptance or not on 25 April 1996. Clearly, the trial court had misdirected itself on the ingredient of s 4(a) offence in requiring proof of solicitation after 11 April 1996. Given that the trap money recovered from the respondent was not challenged and that the respondent was a person serving under a public body, the next step should have been an evaluation of the total evidence in its entirety to determine if the respondent had knowingly, inadvertently or unwillingly accepted the money (see pp 691F–H and 692A–B).

The respondent's total conduct between 11 April 1996 and 25 April 1996, in the light of the established evidence and circumstances of the case, could not reasonably be accounted for on the side of innocence. The combined strength of the circumstantial evidence gave rise to an irresistible inference that the respondent, by his conduct, was in fact soliciting a gratification. Since the respondent solicited the gratification, the acceptance of the trap money could not have been inadvertent. The respondent had knowingly accepted the money and there was cogent evidence that the money was intended as a gratification or reward for not issuing the summons, coupled with the presumption under s 14 of the Act that it was corruptly solicited or corruptly accepted, then all ingredients of the ss 3(a)(ii) and 4(a) offences had been proved beyond reasonable doubt and the defence should be called on both charges (see p 695B–F).

[Bahasa Malaysia summary

Penentang merupakan seorang pegawai yang berkhidmat dengan Majlis Perbandaran Pulau Pinang. Pada 11 April 1996, penentang dan seorang yang lain telah pergi ke rumah pengadu ('SP5'). Penentang telah memaklumkan SP5 bahawa SP5 telah mendirikan sengkuap (awning) rumah tanpa kelulusan perbandaran dan dengan itu telah melakukan satu kesalahan. Kemudian orang yang lain itu telah berkata kepada SP5 bahawa mereka tidak akan mengambil sebarang tindakan jika SP5 memberikan mereka RM300. Mereka berkata bahawa mereka akan kembali pada 12 April 1996 tetapi tidak muncul. SP5 telah melaporkan perkara tersebut kepada pihak berkuasa pada 11 April 1996. Pada 15 April 1996, penentang telah pergi ke rumah SP5 tetapi SP5 tidak berada di rumah dan penentang telah meminta nombor telefon rumah tersebut daripada menantu SP5. Panggilan-panggilan telefon telah diterima pada 20, 22 dan 23 April 1996. Pemanggil telah menyatakan bahawa beliau akan datang ke rumah tersebut pada 25 April 1996. Identiti pemanggil tersebut tidak dibuktikan secara langsung tetapi kesemua panggilan-panggilan itu menurut yang dikesan telah dibuat melalui telefon bimbit kepunyaan penentang.

A Pada 25 April 1996, penentang telah tiba di rumah tersebut. Penentang telah meminta SP5 meletakkan wang tersebut ke dalam sebuah diari dan membawa diari tersebut bersama-sama dengan wang itu ke dalam kereta. Pegawai-pegawai Badan Pencegah Rasuah yang berjaga di luar rumah tersebut telah mengepong kereta itu dan menahan penentang. Penentang telah dituduh di bawah ss 3(a)(ii) B dan 4(a) Akta Pencegahan Rasuah 1961. Ketika membuat kesimpulan kes pendakwaan, mahkamah perbicaraan memutuskan bahawa tidak terdapat keterangan bahawa penentang telah mendengar apa yang diperkatakan oleh orang yang lain itu kepada SP5 pada 11 April 1996, bahawa keterangan nampaknya menunjukkan bahawa orang C yang lain itu telah bertindak secara sendiri dan bahawa pihak pendakwaan telah tidak membuktikan bahawa penentang memujuk rayu SP5 untuk mendapatkan rasuah pada 11 April 1996. Mahkamah perbicaraan mendapati bahawa tidak terdapat sebarang pujuk rayu secara lisan selepas 11 April 1996 dan memutuskan bahawa bahan kesalahan s 4(a) yang didakwa itu telah tidak terbukti. Penentang D telah dibebaskan. Pendakwa Raya telah merayu.

Diputuskan, membenarkan rayuan; perintah pembebasan diketepikan dan penentang diperintah supaya memasukkan pembelaannya:

E

Adalah jelas di dalam bidang kuasa mahkamah perbicaraan untuk meneliti keterangan berhubung pujuk rayu yang didakwa itu, oleh kerana pujuk rayu merupakan bahan faktual kesalahan s 3(a)(ii) yang didakwa itu, dan membuat keputusan-keputusan fakta. Walau bagaimanapun, sehubungan dengan kesalahan s 4(a) yang didakwa F itu dan bahan-bahan kesalahan itu, mahkamah perbicaraan telah membuat kesilapan yang serius. Penerimaan — dan bukannya pujuk rayu — merupakan satu bahan bagi kesalahan s 4(a) yang didakwa. Namun mahkamah perbicaraan telah sesungguhnya terpikat oleh pernyataan atau pun tidak akan penentang selepas 11 April 1996 G mengenai hal perkara RM300 atau pengambilan RM300 daripada SP5 lebih dari persoalan penerimaan atau tidak pada 25 April 1996. Jelasnya, mahkamah perbicaraan telah tersalah arah akan dirinya sendiri mengenai bahan kesalahan s 4(a) dalam menghendaki bukti pujuk rayu selepas 11 April 1996. Memandangkan wang perangkap yang diperolehi kembali daripada penentang telah tidak dicabar dan H bahawa penentang merupakan seorang yang berkhidmat di bawah sebuah badan awam, langkah yang selanjutnya ialah menilai keseluruhan keterangan secara keseluruhannya untuk menentukan jika penentang telah dengan sengaja, dengan tidak sengaja atau secara tidak rela telah menerima wang itu (lihat ms 691F–H dan 692A–B).

I Perlakuan penentang secara menyeluruh antara 11 April 1996 dan 25 April 1996, memandangkan keterangan dan keadaan-keadaan kes yang terbukti, tidak boleh dengan munasabahnya diambil kira sebagai tidak bersalah. Gabungan keteguhan keterangan mengikut

keadaan telah membangkitkan inferens yang tidak boleh dielakkan bahawa penentang, dengan perlakuannya, adalah pada hakikatnya memujuk rayu untuk mendapatkan satu kepuasan. Oleh kerana penentang memujuk rayu kepuasan, maka penerimaan wang perangkap tersebut tidak mungkin sesuatu yang dilakukan dengan tidak sengaja. Penentang telah dengan sengaja menerima wang tersebut dan terdapat keterangan yang meyakinkan bahawa wang tersebut diniatkan sebagai satu kepuasan atau suatu ganjaran kerana tidak mengeluarkan saman, berserta dengan tanggapan di bawah s 14 Akta tersebut bahawa ia telah dipujuk rayu dengan cara yang mencemarkan atau diterima dengan cara yang sedemikian juga, maka kesemua bahan-bahan kesalahan ss 3(a)(ii) dan 4(a) telah dibuktikan melampaui keraguan munasabah dan pembelaan seharusnya dipanggil ke atas kedua-dua pertuduhan tersebut (lihat ms 695B–F).]

Notes

For cases on s 4(a) of the Prevention of Corruption Act 1961, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1868–1889.

Cases referred to

Abd Khalid bin Abd Hamid v PP [1995] 1 MLJ 692 (refd)
Attan bin Abdul Ghani v PP [1970] 2 MLJ 143 (refd)
Balakrishnan v DPP [1969] 2 MLJ 61 (refd)
Gurbachan Singh v PP [1966] 2 MLJ 125 (refd)
Jazuli bin Mohsin v PP [1990] 2 MLJ 190 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Lim Chong Kooi v PP [1965] 2 MLJ 169 (refd)
Lim Kheng Kooi & Anor v R [1957] MLJ 199 (refd)
Mohamed bin Long v PP [1972] 1 MLJ 76 (refd)
Mohamed Ali bin Mohamed Iqbal v PP [1979] 2 MLJ 58 (refd)
Mohamed Taufik v PP [1975] 1 MLJ 36 (refd)
People v Phillips 70 Cal App 2d 449 (refd)
PP v Abdul Malik bin Marahaji & Anor [1994] 2 MLJ 430 (refd)
PP v Dato Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Gurbachan Singh [1964] MLJ 141 (refd)
PP v Ng Nee Tiak [1962] MLJ 421 (refd)
PP v You Kong Lai [1985] 1 MLJ 298 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
R v Gross [1946] OR 1 (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401 (refd)
Vincent Koh & Anor v PP [1965] 2 MLJ 270 (refd)
Voon Ah Soon v PP [1979] 2 MLJ 131 (refd)
Wee Toon Boon v PP [1976] 2 MLJ 191 (refd)
Wellburn, R v (1979) 69 Cr App R 254 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 316

A Prevention of Corruption Act 1961 ss 2, 3(a)(ii), 4(a), 14
Prevention of Corruption Act (Cap 104) s 6(a)

Ahmad Bache (Deputy Public Prosecutor) for the appelant.
S Asamaley (*VM Ravindran* with him) (*Low & Lee*) for the respondents.

B

Cur Adv Vult

Jeffrey Tan J: This is an appeal by the learned Public Prosecutor against the acquittal of the respondents on 29 July 1997, at the close of the case C for the prosecution, on the following alleged offences under the Prevention of Corruption Act 1961:

> Bahawa kamu bersama pada 11 April 1996 jam lebih kurang 10.50 pagi di No 136-Z, Jalan Rambutan, 11500 Air Itam, Georgetown, di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, sebagai agen kepada Kerajaan Malaysia, berjawatan Pembantu Penguatkuasa dan Pembantu Penguatkuasa D Rendah, Unit Penguatkuasaan Jabatan Undang-Undang, Majlis Perbandaran Pulau Pinang, secara rasuah telah memujuk rayu untuk diri kamu suatu suapan iaitu, wang tunai sebanyak RM300 daripada seorang bernama Koik Peik Hwa sebagai suapan untuk tidak mengeluarkan saman ke atas Koik Peik Hwa yang membuat 'awning' di premis tersebut tanpa kebenaran daripada Majlis Perbandaran Pulau Pinang dan dengan itu kamu telah E melakukan satu kesalahan di bawah s 3(a)(ii) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah s 3 Akta yang sama.
>
> Bahawa kamu bersama pada 25 April 1996 jam lebih kurang 9.25 pagi di No 136-Z, Jalan Rambutan, 11500 Air Itam, Georgetown, di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, sebagai agen kepada Kerajaan Malaysia, berjawatan Pembantu Penguatkuasa dan Pembantu F Penguatkuasa Rendah, Unit Penguatkuasaan, Jabatan Undang-Undang, Majlis Perbandaran Pulau Pinang (MPPP), secara rasuah telah menerima untuk diri kamu suatu suapan iaitu, wang tunai sebanyak RM300 daripada seorang bernama Koik Peik Hwa sebagai suapan untuk tidak mengeluarkan saman ke atas Koik Peik Hwa yang membuat 'awning' di premis tersebut tanpa kebenaran daripada Majlis Perbandaran Pulau Pinang dan dengan itu G kamu telah melakukan satu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah s 4 Akta yang sama.

The learned DPP conceded, when this appeal was argued on 25 June 1998, that the prosecution had no case against the second respondent. Thereupon, as only just, the appeal against the second respondent was H dismissed without further ado.

With regard to the appeal against the first respondent, the transcript of the proceedings relates that the prosecution adduced the following evidence in the court below.

The first respondent was an assistant enforcement officer attached to I the Cleanliness Control Unit of the Majlis Perbandaran Pulau Pinang ('MPPP') and had no authority to issue summonses for illegal structures. The second respondent was also attached to the MPPP, but to the Livestock Control Unit. On 11 April 1996 and 15 April 1996, the first respondent did not report for duty. On 11 April 1996, between 3pm to 10pm, the

second respondent was at work. On 15 April 1996, the second respondent was on emergency leave. The Street, Drainage and Building Section of the MPPP did not request nor authorize the Cleanliness Control Unit to investigate any case of illegal structure at Jalan Rambutan, Georgetown.

On 11 April 1996, at about 10.50am, the complainant ('SP5') answered his door bell. At the front gate of his house — 136-Z, Jalan Rambutan, Georgetown (house) — were the first respondent and one other person (not the second respondent). Those two persons came in a white car — PBN 1918. The first respondent produced his authority card and said he was a '*Te Gu*', meaning 'building inspector' in the Hokkien dialect. The first respondent informed SP5 that he (SP5) had erected the house awning without municipal approval and had thereby committed an offence. SP5 explained that he had merely replaced the damaged awning that was already in place when he purchased the house. The first respondent replied that SP5 did not apply for approval and would have to remove the awning. SP5 said that he (SP5) would apply for that approval. The first respondent responded that SP5 must have prior approval before he could erect the awning.

Just then, the other person asked SP5 for the cost of the awning. SP5 told him it was RM3,000. That person remarked that he (SP5) would suffer a substantial loss if the awning is removed. That person then said to SP5 that they (meaning the first respondent and himself) would not take any action if SP5 would give RM300 to them (meaning the first respondent and himself). SP5 replied that he would discuss the matter with his father. SP5 testified that he was just giving an excuse to avoid the issue and pretended to telephone his father. SP5 informed the first respondent and that other person that his father was in Kuala Lumpur and he (SP5) could not make a decision. They said they would come back on 13 April 1996. SP5 informed them he would be going to China on 13 April 1996. They replied they would come back on 12 April 1996. SP5 asked them for the time of their arrival. They said they were not sure. SP5 testified that he decided to report the matter to the authorities.

On 11 April 1996 at about 2pm, SP5 reported the events in the morning to Ch'ng Soon Heng (SP8) of the Anti-Corruption Agency. A trap was devised. The following day, two officers from the Anti-Corruption Agency stationed themselves in SP5's house. The first respondent and that other person did not turn up on 12 April 1996. Just the second respondent was seen passing the house.

Between 13 April 1996 to 21 April 1996, SP5 was in China. Meanwhile, on 15 April 1996, at about 9.30am, SP6 (SP5's daughter-in-law) answered the door of the house. At the front gate was the first respondent who asked for SP5. SP6 said that SP5 was in China. SP6 asked the first respondent for the reason for his failure to keep the appointment on 12 April 1996. The first respondent replied that he was not specific on his time. The first respondent asked when would SP5 return. SP6 replied that SP5 would return on 22 April 1996. The first respondent asked for the telephone number of the house. SP6 gave it to him. The first respondent asked for

A SP5's name. SP6 replied, 'Koik Ah Ba'. The first respondent came in a white car driven by another person.

On 20 April 1996, at about 10am to 11am, SP6 answered the telephone. The caller said he had come before to the house to look for Koik Ah Ba and asked when would Koik Ah Ba return. SP6 replied that Koik Ah Ba B would return on 22 April 1996. The caller said he could not wait much longer.

On 22 April 1996, at about 10.15am, SP6 answered the telephone from a caller who said he was looking for Koik Ah Ba. SP6 requested the caller to come in the evening. The caller said he would come to the house on 25 April 1996. SP6 informed SP5 of the telephone calls on 20 April C 1996 and 22 April 1996 and of the first respondent's visit on 15 April 1996.

On 23 April 1996, SP5 answered the telephone from a caller who identified himself as someone from MPPP. The caller asked for Koik Ah Ba. Pretending he was not Koik Ah Ba, SP5 replied that Koik Ah Ba had not returned. The caller asked when would Koik Ah Ba return. SP5 D replied that he did not know. The caller said he would come to the house on 25 April 1996, to see Koik Ah Ba. After that conversation, SP5 telephoned SP8 who instructed SP5 to remain in the house on 25 April 1996.

On 25 April 1996, at about 7am, ACA officers arrived at the house. E Chew Ai Wah (SP7) handed six RM50 notes and a list of numbers to SP5. SP7 asked SP5 to compare the numbers on the list (P15) with the numbers of the six RM50 notes. At about 9.15am, the first and second respondents arrived at the house. One of them sounded the door bell. SP5 walked out of the house, towards the front gate.

F The following was the testimony of SP5, at pp 31 and 33 of the appeal record:

> Saya keluar dan berjalan ke pintu pagar. OKT1 datang dekat pintu pagar dan saya hendak menyerahkan duit kepadanya. Dia enggan menerima dan kata takut orang nampak. Saya pun buka pintu gate untuk membolehkannya masuk ke dalam rumah. Dia pun masuk sampai ke 'porch' — di bawah G 'awning'. Dia letakkan sebuah diari di atas meja tokong kecil. Dia memberi isyarat suruh saya masukkan duit ke dalam diari itu. Lepas itu dia keluar. Sebelum itu saya mintanya jangan kacau lagi. Dia kata 'Tiada' dan keluar. Saya pun cepat-cepat masuk ke dalam sebab itu adalah arahan pegawai-pegawai BPR.
>
> H Setelah saya masukkan duit dalam buku diari itu, OKT1 membawa buku itu dan kepil di bawah ketiaknya dan berjalan keluar melalui gate. Semasa dia berjalan keluar, saya minta dia jangan kacau lagi. Dia jawab 'Tidak!'. Lepas dia beredar saya pun terus masuk ke rumah — bilik tamu.

SP7 and another ACA officer rushed out from the house. ACA officers stationed outside the house surrounded the car and apprehended the I respondents. The diary was recovered from inside the car. Between the pages of the diary were six RM50 notes with numbers matching P15. All said telephone calls to the house were traced to a mobile phone belonging to the first respondent.

In the court below, both Mr Ravi and Mr Assamaley, respectively for the first and second respondents, subjected SP5 and SP6 to prolonged and protracted examination. Nonetheless, the story of the prosecution, as summarised in this grounds, was not undone by their examination.

On that evidence, the trial court held there was no evidence that the first respondent heard what was said by that other person on 11 April 1996 to SP5 and that the evidence — including the police report (P14) — seemed to show that that other person had acted on his own. That done, the trial court then concluded that the prosecution had not proved that the first respondent solicited a bribe from SP5 on 11 April 1996 (see p 145 of the appeal record).

On the second charge, the trial court adopted a more elaborate approach. It took up the following, as issues arising:

(i) whether the events that occurred in the compound of the house on 25 April 1996 could be construed that the first respondent had knowingly accepted the money from SP5;

(ii) whether the receipt of the money was corrupt gratification; and,

(iii) whether the first respondent had indeed demanded a bribe.

Then, the trial court addressed those three issues in the following vein (see p 145 of the appeal record):

> Oleh kerana saya telah putuskan bahawa OKT1 tidak memujuk-rayu untuk satu suapan pada kejadian pertama, iaitu, pada 11 April 1996, perkara-perkara yang berlaku selepas itu perlu diperhatikan dengan teliti. Harus diingatkan bahawa pada 11 April 1996 tiada apa-apa persetujuan dicapai antara kedua dua pihak mengenai penyelesaian perkara yang timbul dengan cara pemberian wang kepada pegawai-pegawai MPPP. Persoalannya adalah sama ada pada atau selepas 11 April 1996, OKT1 atau rakannya pernah menyebut tentang wang berjumlah RM300 atau tentang mengutip wang itu daripada SP5 apabila mereka datang ke rumahnya kelak? Memadailah untuk menyatakan di sini bahawa keterangan SP5 banyak bercanggah dalam isu ini dan tidak wajar atau selamat diterima sebagai bukti permintaan wang.

Apparently, towards proof of the s 4(a) charge, the trial court required evidence that the first respondent or friend [accomplice?] after 11 April 1996 uttered the sum of RM300 or collection of the sum of RM300 from SP5, because there was no evidence, so the trial court rationalized, that the first respondent solicited a bribe from SP5 on 11 April 1996.

The three issues taken up by the trial court, the manner in which the trial court addressed those three issues as well as the trial court's finding that it was unsafe to rely on SP5's evidence, '*sebagai bukti permintaan wang*', will be examined later, in the light of the entire evidence and applicable law.

For the moment, it is more urgent, since the trial court omitted so to do, to spell out briefly the law relating to offences under ss 3(a)(ii) and 4(a) of the Act, an exercise which should show out, reasonably, if the trial court had or had not fallen into an error of law.

Section 3(a)(ii) reads as follows:

A Any person who shall by himself or by or in conjunction with any other person —

(a) corruptly solicit or receive or agree to receive for himself or for any person any gratification as an inducement to or reward for, or otherwise on account of

B (ii) any member, officer, or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the public body is concerned,

shall be guilty of an offence ...

Section 4(a) of the Act reads as follows:

C

If an agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification, as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to

D show favour or disfavour to any person in relation to his principal's affairs or business ... shall be guilty of an offence ...

The Act defines the words 'agent' and 'principal' as follows:

Agent means any person employed by or acting for another, and includes a trustee, administrator and executor, and a person serving under any public

E body, and for the purposes of section 14 includes a sub-contractor and any person employed by or acting for such sub-contractor.

Principal includes any employer, any beneficiary under a trust, and any trust estate (as though it were a person), any person beneficially interested in the estate of a deceased person, the estate of a deceased person (as though it were a person) and, in the case of any person serving under a

F public body, the public body.

Evidently, 'agent' as defined in the Act is not the same as 'agent' as defined in the Contracts Act 1950 (*Voon Ah Soon v PP* [1979] 2 MLJ 131); the first respondent, being a person serving under a public body as defined in s 2 of the Act, which would include the MPPP, was an agent within the

G meaning of the Act and prohibited from bringing about the acts forbidden by s 4 of the Act.

The Act does not define the word 'solicit' or 'corruptly'. The ordinary dictionary meaning of 'solicit' is 'ask repeatedly or earnestly for or seek or invite' (*The Concise Oxford Dictionary* (9th Ed)). Indeed, in *PP v You Kong*

H *Lai* [1985] 1 MLJ 298, Shankar J (as he then was) likened 'solicit' in s 3 to 'invite'. When used in the context of solicitation of a bribe, it means 'asking, enticing, or requesting'. It is a word which implies a serious request, but 'requires no particular degree of importunity, entreaty, imploration or supplication' (*Black's Law Dictionary* (6th Ed), citing *People v Phillips* 70 Cal App 2d 449).

I

The key word in both ss 3 and 4 is 'corruptly'. 'When used in a statute, this term, generally imports a wrongful design to acquire some pecuniary or other advantage' (*Black's Law Dictionary* (6th Ed)). 'The word "corruptly" ... sounds the keynote to the conduct ... the giving of a gift or

consideration, not bona fide but mala fide, and designedly, wholly or partially, for the purpose of bringing about the effect forbidden by the section': *R v Gross* [1946] OR 1 at p 9, per Roach JA. ... it means an act by one man knowing that he is doing what is wrong, and knowing so with evil feelings and evil intentions (*Lim Kheng Kooi & Anor v R* [1957] MLJ 199 at p 205, per Shepherd J), an act which the law forbids as tending to corrupt (*Wellburn* (1979) 69 Cr App R 254). But what is or is not 'corrupt' is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section: *PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at p 22, per Raja Azlan Shah FJ (as HRH then was).

In a trial of a s 3(a) offence, it is not necessary for the prosecution to prove that the gratification in fact induced the act or forbearance (*PP v You Kong Lai*), or that the accused had the power to perform the act or forbearance stipulated in the charge (*Abd Khalid bin Abd Hamid v PP* [1995] 1 MLJ 692). But it was necessary for the prosecution to prove that the first respondent on 11 April 1996 corruptly solicited for himself a gratification of RM300 as an inducement or reward for or on account of him not issuing a summons to SP5 for the erection of an awning without municipal approval.

In a trial of a s 4(a) offence — and it is an offence for an agent to receive from any person gratification as a reward for showing favour to that person or to any other person, not necessarily the giver of the gratification (*Mohamed bin Long v PP* [1972] 1 MLJ 76) — it is not necessary for the prosecution to prove that the person who gave the bribe had committed an offence or that the favour sought is in relation to the principal's affairs (*Mohamed Taufik v PP* [1975] 1 MLJ 36; *Vincent Koh & Anor v PP* [1965] 2 MLJ 270) or on behalf of the principal (*Mohamed Ali bin Mohamed Iqbal v PP* [1979] 2 MLJ 58), that favour had been shown (*Gurbachan Singh v PP* [1966] 2 MLJ 125), that the accused had power to do what he promised (*Lim Chong Kooi v PP* [1965] 2 MLJ 169; see also s 6), or, that the accused must be on official duty (*PP v Abdul Malik bin Marahaji & Anor* [1994] 2 MLJ 430). But it is essential for the prosecution to prove that the first respondent corruptly accepted for himself from SP5 a gratification of RM300 as an inducement or reward for not issuing a summons to SP5 for the erection of an awning without municipal approval (see *Wee Toon Boon v PP* [1976] 2 MLJ 191 at p 197 where Wee Chong Jin CJ listed the factual ingredients of an offence under s 6(a) of the Prevention of Corruption Act (Cap 104) which is in pari materia with s 4(a)). Pertinent to this appeal, solicitation is not an ingredient of a s 4(a) offence.

However, in either case, 'where in a [prosecution] against a person for an offence under ss 3 or 4 it is proved that any gratification has been paid or given to or received by an accused in the employment of a public body, the gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward ... unless the contrary is proved' (s 14). It means, once it has been proved that money has been given to or

A received by an accused and employee of a public body, the presumption under s 14 arises that the money had been given or received corruptly as an inducement or reward and it is for the accused to give an innocent explanation (*Thavanathan a/l Balasubramaniam v PP* [1997] 2 MLJ 401) to rebut the presumption under s 14 of the Act that the money was obtained corruptly or as an inducement or reward for doing an act in relation to the principal's affairs (*Balakrishnan v DPP* [1969] 2 MLJ 61; see also *Attan bin Abdul Gani v PP* [1970] 2 MLJ 143, *PP v Ng Nee Tiak* [1962] MLJ 421, *Jazuli bin Mohsin v PP* [1990] 2 MLJ 190 and *Lim Chong Kooi v PP*). '[That] burden of proof on an accused person ... is not higher than that on a party to a civil case to prove his case on a balance of probabilities' (*PP v Gurbachan Singh* [1964] MLJ 141, per Hepworth J; see also *Lim Chong Kooi v PP*). 'The burden [is] ... discharged ... if the court considers that on a balance of probabilities the gratification was not paid or given or received corruptly as an inducement or reward as mentioned in ss 3 or 4 of the Act' (*PP v Yuvaraj* [1969] 2 MLJ 89); see also *Thavanathan a/l Balasubramaniam v PP* at p 421). No similar presumption applies to agents or private principals: *PP v Yuvaraj* at p 92, per Lord Diplock.

The above governed the trial below. As said, at the close of the prosecution case, the trial court held there was no evidence that the first respondent heard what was said by that other person on 11 April 1996 to SP5, that the evidence seemed to show that another person had acted on his own and that the prosecution had not proved that the first respondent solicited a bribe from SP5 on 11 April 1996. Now, putting aside for the moment the issue of the veracity of those findings, it was well within the jurisdiction of the trial court to scrutinize the evidence relating to the alleged solicitation, since solicitation was a factual ingredient of the alleged s 3(a)(ii) offence, and make findings of fact.

However, in connection with the alleged s 4(a) offence and ingredients of that offence, the trial court had fallen into serious error. Solicitation was not an ingredient of the alleged s 4(a) offence. Acceptance was. Yet, with respect, the trial court was totally smitten by the utterances or not of the first respondent or friend after 11 April 1996 on the subject of the said RM300 or collection of RM300 from SP5 rather than the question of the acceptance or not on 25 April 1996. In the event, finding there was no verbal solicitation after 11 April 1996 — '*memadailah untuk menyatakan di sini bahawa keterangan SP5 banyak bercanggah dalam isu ini dan tidak wajar atau selamat diterima sebagai bukti permintaan wang*' — the trial court held that the ingredients of the alleged s 4(a) offence had not been proved. Clearly, the trial court had misdirected itself on the ingredients of the s 4(a) offence in requiring proof of solicitation after 11 April 1996. Admittedly, any verbal solicitation after 11 April 1995 — proof that the first respondent's 'acceptance' of the said RM300 was not innocent — was material. But absence of verbal solicitation after 11 April 1996 per se was not fatal to the prosecution. For even if it was true and a fact that after 11 April 1996, the first respondent or his friend had not mentioned the subject of the money or collection of the money, it remained that the prosecution had merely not adduced that particular evidence but that is

not necessarily the only evidence that the 'acceptance' or rather how the money got to be with the first respondent, was not innocent. Given that the trap money recovered from the first respondent was not challenged and that the first respondent was a person serving under a public body, the next step should have been an evaluation of the total evidence in its entirety to determine if the first respondent had knowingly, inadvertently or unwillingly accepted the money. The following two authorities are relevant.

In *PP v Datuk Haji Harun bin Haji Idris (No 2)* at p 19, Raja Azlan Shah FJ (as HRH then was) pronounced as follows:

> It is also salutory to remember that in a corruption case, direct testimony of wholly disinterested witnesses can seldom, if ever be forthcoming. It is invariably circumstantial evidence which has to be availed of in such a case.

In *Abd Khalid bin Abd Hamid v PP*, on direct evidence of mens rea of a s 3(a)(ii) offence, Zaleha Zahari JC (as she then was) accentuated as follows:

> In a case like this, where the evidence is circumstantial, what has to be considered is to consider not only each individual piece of evidence but the combined strength of these strands when twisted together, whether the various circumstances to which they spoke pointed irresistibly in one direction and in one direction only, the direction being the appellant.

Unfortunately, that was not observed in the trial below. But it would appear, so far as the trial court was concerned, that the prosecution simply had no case if there was no verbal solicitation on and after 11 April 1996. Also, the visit and conduct of the first respondent on 11 April 1996, the visit and conduct of the first respondent on 15 April 1996, the conversation between the first respondent and SP6 on 15 April 1996, the telephone calls on 20 April 1996, 22 April 1996 and 23 April 1996, the fact that all telephone calls were made from the first respondent's mobile telephone, the visit and conduct of the first respondent on 25 April 1996 — which were overlooked or not properly evaluated — were of no consequence whatsoever. And much more of the evidence was not considered, as would be related later in the evaluation of the evidence which has been thrust upon this court by the omission of the trial court.

The trial court also failed to understand the substance of the second charge, accounting perhaps, for its failure, perceptible throughout the grounds of judgment, to appreciate the proceedings and issues before it.

To recapitulate, the second charge reads as follows:

> Bahawa kamu bersama pada ... secara rasuah telah menerima untuk diri kamu suatu suapan iaitu, wang tunai sebanyak RM300 daripada seorang bernama Koik Peik Hwa sebagai suapan untuk tidak mengeluarkan saman ... dan dengan itu kamu telah melakukan satu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah s 4 Akta yang sama.

Thus couched, the second charge was undoubtedly framed with the provisions of s 4 in mind. The trial court assumed that the first respondent had accepted/received (*menerima*) the money (see pp 145 and 147 of the

A appeal record) and the prosecution was entitled, accordingly, to the presumption under s 14.

The effect of s 14 was expressed in the following words in *PP v Yuvaraj* at p 90:

> B Where a defendant is charged with an offence under s 4(a) of the Prevention of Corruption Act 1961, to which s 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence, viz: (1) that a gratification was paid or given to or received by the defendant; and (2) that at the same time of the payment, gift or receipt, he was in the employment of a public body. Upon proof of these two ingredients, the existence of the third ingredient, viz; (3) that the gratification was paid or C given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed unless the contrary is proved.

Yet inexplicably, hopefully it was not bending over backwards, the trial court ruled as follows:

> D Tapi, pertuduhan kedua ini adalah spesifik bahawa OKT1 telah menerima suapan itu sebagai satu dorongan untuk mengelak daripada melakukan satu tindakan resmi dan kes pendakwaan tidak berasaskan anggapan tersebut. Oleh itu, dalam konteks kes ini, pendakwaan perlu buktikan intipati dorongan terhadap OKT1.

E A clear and unambiguous provision of the Act (s 14) was ignored. On the other hand, whereas it must be proved, the trial court assumed (*andaian*) that the first respondent must have knowingly accepted/received (*menerima*) the money from SP5 — '*Dengan andaian dibuat bagi isu pertama bahawa memangnya OKT1 telah menerima wang tersebut daripada SP5 pada ketika itu*'. If that was the case that the first respondent must have accepted/ F received the trap money from SP5, and given that the third ingredient was evident (even though it could be presumed — see *Yuvaraj*), then the prosecution had made out a clear case under s 4(a). All that was left to do was to call for the defence. But that was not to be. To top it all, the trial court acquitted the first respondent on a doubt of what it perceived, G erroneously, as a sine qua non — the verbal solicitation after 11 April 1996. With respect, the trial court was lost. Its findings of fact and law, with regard to the second charge, were founded on wrong premises of law and reached without consideration of the evidence in its entirety. Inevitably, a failure of justice was the result.

H The result should have taken into consideration the matters in the following discussion.

To begin with, it was not in dispute that the first respondent took the diary with the money to the car and that the first respondent was a person serving under a public body at the material time of the alleged payment. According to the prosecution, the first respondent corruptly solicited and I corruptly accepted for himself that RM300 from SP5 as a gratification or reward for not issuing a summons to SP5 for the illegal awning.

But there was no evidence that the first respondent uttered the words of solicitation. The actual words of solicitation were uttered by an

unidentified person who came together with the first respondent. Could it not have been, since there was no evidence that the first respondent could hear what was said by that other person to SP5, that the first respondent was not aware of the verbal solicitation by that other person? And if so, would not the first respondent have been an innocent bystander? But if the first respondent was an innocent bystander, then what was the reason for his further visits to the house on 15 April 1996 and 25 April 1996? It could have been to issue a summons, except that he did not have the authority to do so. But even if he had authority, why would he not issue the summons to SP5 on 11 April 1996 (not on 15 April 1996 when SP5 was in China) or 25 April 1996? However, the first respondent had no business to be calling repeatedly at the house. But if there was no solicitation, would SP5 have permitted the entry of the first respondent to his house? What was the reason for the first respondent to have introduced himself as a 'Te Gu' when he was not? Was it to lend himself authority, so that his friendly advice, as a good Samaritan, would be heeded or was it a prelude to the solicitation, albeit not from him, that would follow? Was not the conduct of the first respondent — he reported he was sick and did not turn up for work on 11 April 1996 and 15 April 1996 but yet was spending time visiting the house of a stranger — particularly strange?

If the latter is strange and suspicious, the following is telling. On 15 April 1996, responding to the first respondent's enquiry, SP6 informed the first respondent that the name of SP5 was 'Koik Ah Ba'. SP6 gave the house telephone number to the first respondent. A few days later, on 20 April 1996, a telephone call asking for 'Koik Ah Ba' was received. The caller said he had come before to the house to look for Koik Ah Ba. Thereafter, telephone calls asking for 'Koik Ah Ba' were received on 22 April 1996 and 23 April 1996. On both occasions, the caller said he would call at the house on 25 April 1996. All telephone calls to the house were traced to a mobile phone belonging to the first respondent. On 25 April 1996, the first respondent came to the house.

Again, it is best to proceed with the evaluation of the evidence from the bedrock of established evidence — the alleged telephone calls to the house, all documented, that could not be doubted. The actual conversation is of course another matter. The identity of the caller was not directly established. However, the caller used the first respondent's mobile phone (an appliance normally carried by the owner), and reasonably, the first respondent would have been the caller or would know the identity of the caller. Either case, the telephone calls connected and implicated the first respondent. On the alleged conversations, perhaps it was a lie that SP6 on 15 April 1996 had given the fictitious name of SP5 and telephone number to the first respondent. But if it was a lie, then how could there have been the telephone calls to the house from the first respondent's mobile phone? Perhaps, the caller had secured the number from the telephone directory or through some other means. But if it was a lie that the caller said that he would come to the house on 25 April 1996, then how could SP5 have been able to tell the ACA beforehand, unless he was clairvoyant, that the persons soliciting from him would be calling on 25 April 1996? And if the

A first respondent was not the caller or in league with the caller, why was he the person appearing on 25 April 1996? Reasonably, it should add up that the testimony of SP5 and SP6 on the conversation between them and the caller, on the solicitation, all affirmed by the appearance of the first respondent on his own volition, was credible and reliable.

B The rhetorical questions provoked answers that are not favourable to the first respondent, the combined effect being that the first respondent would not not have known of the verbal solicitation on 11 April 1996. His total conduct, between 11 April 1996 and 25 April 1996, particularly as he had no business to be repeatedly calling at the house and he could not have gained access if not for the truth of the alleged solicitation, in the light of C the established evidence and circumstances of the case, could not reasonably be accounted for on the side of innocence. Rather it gives rise to an irresistible inference that the first respondent was an active participant. Indeed, the combined strength of the circumstantial evidence gives rise to an irresistible inference that the first respondent, by his conduct, was in D fact soliciting a gratification. It could not be interpreted any other way. It means, since the first respondent solicited the gratification, that the acceptance of the trap money could not have been inadvertent. Since the first respondent had knowingly accepted the money, and there was cogent evidence that the money was intended as a gratification or reward for not issuing the threatened summons, coupled with the presumption under E s 14 that it was corruptly solicited or corruptly accepted, then all ingredients of the ss 3(a)(ii) and 4(a) offences had been proved beyond all reasonable doubt — the standard of proof at that particular time. As would be discerned from the latter evaluation, the defence should be called on both charges, even without the evidence that the trial court disbelieved — the F evidence that the first respondent after 11 April 1996 had verbally solicited from SP5.

The trial court disbelieved SP5's evidence on the verbal solicitation after 11 April 1996 — in particular, the alleged verbal exchange between SP5 and first respondent at the gate on 25 April 1996 and the alleged signals by the first respondent to SP5 to deposit the money into the diary.

G In *Thavanathan*'s case, the Federal Court echoed the following observation of Thompson CJ in *Khoon Chye Hin v PP* [1961] MLJ 105 at p 107:

> If a witness demonstrably tells lies on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence, the rest of his H evidence must be scrutinized with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points, then the whole of his evidence must in law be rejected is to go too far and is wrong.

In *PP v Datuk Haji Harun bin Haji Idris (No 2)* at p 19, Raja Azlan Shah FJ I (as HRH then was) enunciated it further:

> There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and

> cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

The trial court, if only it had scrutinized and evaluated each evidence, giving the proper weight to each evidence and to the aggregate, in the light of the circumstances of the case and applicable law, reasonably ought to have concluded, notwithstanding its rejection of all evidence on all verbal solicitation after 11 April 1996, that the first respondent by his conduct on 11 April 1996 and thereafter was soliciting a gratification on 11 April 1996 from SP5. The problem was that the trial court was searching for direct evidence — verbal solicitation from the first respondent — when the circumstantial evidence, if only examined, would have answered the three issues taken up by the trial court in the affirmative. Because it proceeded on the wrong basis that 'soliciting' was only 'demanding'. The bottom line was that the first respondent knowingly accepted money from a member of the public. He must give an account.

For as Lord Diplock explained, in *Yuvaraj*, at p 92:

> The section is designed to compel every public servant so to order his affairs that he does not accept a gift in cash or in kind from a member of the public except in circumstances in which he will be able to show clearly that he has legitimate reasons for so doing.

Section 316 of the Criminal Procedure Code (FMS Cap 6) provides as follows:

> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
>
> (a) in an appeal from an order of acquittal, reverse such order ...

In the instant case, there was a misdirection of law on the ingredients of the s 4 offence, an unreasonable rejection of an applicable statutory presumption, an improper assumption that the first respondent had received the trap money, a failure to evaluate the evidence in its entirety or give any weight to the evidence that it did not disbelieve, that occasioned a failure of justice. Surely, there is sufficient reason for the appellate court to interfere.

For the reasons herein and allowing the appeal, the order of acquittal is set aside; the first respondent is hereby ordered to enter his defence before the trial court on the original charges, but with an amendment — the deletion of the word '*bersama*' after the words '*Bahawa kamu*'.

Appeal allowed.

Reported by Jafisah Jaafar